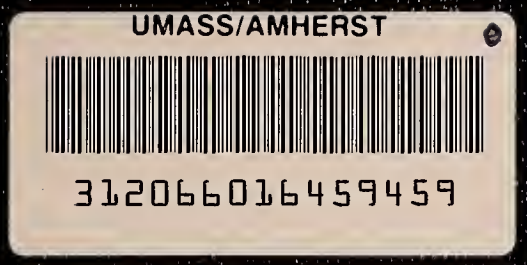

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SUBDIVISION PLANS AND SEPARATE LOT PROTECTION

For many years, zoning legislation in Massachusetts has provided a zoning protection for separately held substandard building lots. The first separate lot protection was inserted into the Zoning Enabling Act in 1958. See St. 1958, c. 492. Presently, MGL, Chapter 40A, Section 6, fourth paragraph, provides the following separate lot protection:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use **which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land,** conformed to then existing zoning requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

As was noted in Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), the purpose of the separate lot protection is to protect a once valid lot from being rendered unbuildable for residential purposes but only if there is compliance with all the statutory conditions. The imprecise language of the separate lot protection provision which has caused the most confusion is the requirement that the lot "at the time of recording or endorsement, whichever

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occurs sooner was not held in common ownership with any adjoining land."

When must the lot be in separate ownership in order for the lot to enjoy the zoning protection currently afforded separate lots?

The Massachusetts Appeals Court first looked at this issue when it decided Sieber v. Zoning Board of Appeals, Wellfleet, 16 Mass. App. Ct. 985 (1983). The court found that if the lot was in separate ownership prior to the town meeting vote which made the lot substandard then the lot could be built upon for single or two-family use. Later, in Adamowicz v. Town of Ipswich, 395 Mass. 757 (1985), the Massachusetts Supreme Judicial Court interpreted the separate lot provision by responding to three questions which had been posed by the United States Court of Appeals for the First Circuit. The Court agreed with the Sieber decision and reached the following conclusions:

> 1. the word "recording" as appearing in the separate lot provision means the recording of any instrument, including a deed;
>
> 2. the statute looks to the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought; and,
>
> 3. a lot meets the statutory requirement of separate ownership if the most recent instrument of record prior to a restrictive zoning change reveals that the lot was separately owned, even though a previously recorded subdivision plan may reveal that the lot was at one time part of land held in common ownership.

By filing a definitive subdivision plan, a landowner can protect the land shown on such plan from the application of new and more stringent zoning requirements imposed by an amendment to a zoning ordinance or bylaw which occurs after the submission of the definitive plan provided the subdivision plan is subsequently endorsed by the Planning Board. A preliminary plan will also protect the land from future zoning changes provided a definitive plan is submitted within seven months from the date of submission of the preliminary plan. The duration of the definitive plan zoning freeze has had a history of ups and downs, though mostly ups. It began as a three year freeze in 1957 and in 1961 the freeze was increased to five years. In 1965 the freeze was set at seven years but descended once again to five years in 1975. In 1982 the freeze period went up to eight years. See St. 1957, c. 297; St. 1961, c. 435, s. 2; St. 1965, c. 366; St. 1975, c. 808, s. 2; St. 1982, c. 185.

Presently, MGL, Chapter 40A, Section 6 affords the following eight year zoning freeze to land shown on a subdivision plan which has been approved by the Planning Board pursuant to the Subdivision Control Law.

> If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board ... and written notice of such submission has been given to the city or town clerk ... **the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law**, if any, **in effect at the time of the first such submission** while such plan or plans are being processed under the subdivision control law, and, if such definitive plan ... is finally approved, **for eight years from the date of endorsement of such approval** except ... where such plan was submitted or submitted and approved before January first, nineteen hundred seventy-six, for seven years from the date of endorsement of such approval.

What happens if within the eight year period a community increases its minimum lot area, lot frontage or yard requirements? All lots shown on an approved definitive subdivision plan are all initially in common ownership. Can a lot be conveyed into separate ownership after the increased zoning requirement and still gain the benefit of the separate lot protection? The answer is no.

When the legislature rewrote the Zoning Act in 1975, they eliminated some key language from the separate lot protection provision. Prior to the 1975 rewrite, the language of the Zoning Act provided, in relevant part, the following separate lot protection.

> Any lot lawfully laid out by plan or deed duly recorded, as defined in section eighty-one L of chapter forty-one, or any lot shown on a plan endorsed with the words "approval under the subdivision control law not required" or words of similar import, ... which complies at the time of such recording or such endorsement, whichever is earlier, with the minimum area, frontage ... requirements, if any, of any zoning ... bylaw in effect in the ... town ... notwithstanding the adoption or amendment ... of a zoning ... bylaw in such ... town imposing minimum area, frontage, ... or yard requirements ... in excess of those in effect at the time of such recording or endorsement ... may thereafter be built upon for residential use if, at the time of the adoption of such requirements or increased requirements, **or while building on such lot was otherwise permitted,** whichever occurs later, such lot was held in ownership separate from that of adjoining land located in the same residential district ... .

Under the above provision, a lot would qualify for separate lot protection if it was in separate ownership prior to the effective date of the more restrictive zoning requirement or if it was conveyed into separate ownership during the definitive plan zoning freeze because during that time

conveyed into separate ownership during the definitive plan zoning freeze because during that time **building on the lot was otherwise permitted.** However, in order for lots to be conveyed into separate ownership within the definitive plan freeze period and be eligible for separate lot protection, the definitive plan had to be recorded prior to the effective date of the increased zoning requirement.

In Wright v. Board of Appeals of Falmouth, 24 Mass. App. Ct. 409 (1987), the court had an opportunity to review the old and existing separate lot protection provisions and their application to lots shown on a previously approved subdivision plan. A preliminary plan had been submitted to the Planning Board prior to the town increasing the minimum lot area requirement. After the effective date of the increased lot area requirement the Planning Board **approved and endorsed** a definitive subdivision plan. Prior to the expiration of the definitive plan zoning freeze, which at that time was seven years, all seventy six lots shown on the definitive plan were conveyed into separate ownership. At a later date, one of the lot owners applied to the Building Inspector to construct a single family home on her separately held lot. The building permit application was denied by the Building Inspector and on appeal the Zoning Board of Appeals upheld the Building Inspector's decision.

The landowner argued that when the Planning Board endorsed the definitive plan, the zoning in effect at the time the plan was first submitted governed the land shown on the plan for seven years. The landowner further argued that the separate lot protection provision of the Zoning Act in effect prior to the 1975 rewrite by the legislature allowed the lots to be conveyed into separate ownership within that seven year period. The court found that the lot owner was not entitled to that protection because the subdivision plan **was endorsed by the Planning Board after the effective date of the increased zoning requirements.** If the definitive plan had been recorded prior to the effective date of the increased zoning requirements then the lots could have been conveyed into separate ownership within the seven year period and such lots would have had the benefit of the separate lot protection.

The court also reviewed the current separate lot protection provision and concluded that in order to be eligible for such protection the lot must be in separate ownership at the time of the increased zoning requirement. Therefore, the current definitive plan zoning freeze is a build protection. Building permits for lots shown on an approved definitive plan, which do not have separate lot protection, should be issued prior to the expiration of the eight year freeze period. As was noted in Falcone v. Zoning Board of Appeals of Brockton, 7 Mass. App. Ct. 710 (1979), the mere filing of a building permit application will not toll the running of the zoning freeze period. In Falcone, the landowner did not apply for a building permit until the last day before the freeze period expired making it impossible to secure the approvals necessary for the issuance of the building permit before the expiration of the zoning freeze period. The court held that the filing of the building permit application gave the landowner no vested rights and the denial of the building permit was controlled by the zoning regulations in effect at the time the decision on the building permit application was made by the building official. However, if the building permit application is filed in a timely manner, the zoning protection will not be lost due to a local officials inaction. In Green v. Board of Appeals of Norwood, 2 Mass. App. Ct. 393 (1974), the landowner had applied for a building permit approximately fourteen months before the expiration of the zoning freeze period. Approximately two and a half years later the application for the building permit was denied. The

court held that the zoning freeze period afforded by the Zoning Act could not be lost through a local official's inaction.

The condition that a lot be separately held from any adjoining land is based on the longstanding zoning principle that a landowner should not be allowed to create a dimensional nonconformity if he can use his adjoining land to avoid or diminish the nonconformity. In order to perpetuate a zoning freeze for residential subdivision lots, landowners have engaged in the practice of "checkerboarding" subdivision lots. "Checkerboarding" refers to a practice where a landowner conveys lots so that the pattern of ownership places each lot in separate ownership. However, the court has looked unfavorably on last minute conveyances which attempt to qualify lots for the separate lot protection. In Sorenti v. Board of Appeals of Wellesley, 345 Mass. 348 (1963), the court held that a landowner could not take advantage of a local zoning bylaw grandfather protection by putting part of his property in the name of a straw the day before the town voted to increase the minimum lot frontage requirement of the zoning bylaw. The court found that the lot owner had adjoining land available despite the fact that the adjoining land stood in the name of the straw.

In Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), aff'd 406 Mass. 1008 (1990), the Serenas, in anticipation of a zoning bylaw amendment which would prevent use of their vacant land as two separate building lots effected a transfer of title with the intent of securing separate lot protection for their two adjoining lots. The Serenas transferred title to one lot to themselves as tenants by the entirety and to the adjoining lot to themselves as trustees of Parker Realty Trust. The Serenas were the sole beneficiaries of the trust. The attempt to secure separate lot protection for both lots failed because the Serenas could still use the two lots as one. The court found that the question in determining separate ownership is "not the form of ownership, but control: did the landowner have it "within his power", i.e., within his legal control, to use the adjoining land so as to avoid or reduce the nonconformity?"

In DiStefano v. Stoughton, 36 Mass. App. Ct. 642 (1994), a developer attempted to place lots, which were shown on a previously approved definitive plan, into separate ownership sixteen days before the expiration of the definitive plan zoning freeze. A&A Contracting, Inc. the record owner of all the lots in the subdivision conveyed twelve lots to Albert N. DiStefano, as trustee of A.N.D. Realty Trust, five lots to Albert individually, and four lots to Anna M. DiStefano, who was Albert's wife. The remaining lots remained with A&A Contracting, Inc. In reviewing the conveyances the court determined that Albert DiStefano retained the master hand as to all the lots in the subdivision. He was the sole director and officer of A&A Contracting, Inc., and was the sole trustee and had plenary power to make conveyancing decisions for A.N.D. Realty Trust. The court also determined that the lots conveyed to Anna were in fact under Albert's control because the group of lots transferred to her were "sold" for a nominal consideration of $100 and there was no evidence that the $100 was ever paid. Anna acceded to Albert's control in the corporation; and Albert filed a revised subdivision plan at a later date for all the lots in the locus with no participation by Anna. In determining separate ownership the court noted that they "may disregard the shell of purportedly discrete legal persons engaged in business when there is active and pervasive control of those legal persons by the same controlling person and there is a confusing intermingling of activity among the purportedly separate legal persons while engaging in a common enterprise."

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